JALANI MOHAMED & ANOR v. SHAHROM ABDULLAH & ANOR

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
S NANTHA BALAN JCA
MOHD NAZLAN GHAZALI JCA
[CIVIL APPEAL NO: A-02 (NCVC)(W)-370-02-2022]
12 JANUARY 2024

Abstract – *(i) Section 340(3) of the National Land Code provides that a title in land, acquired in good faith and for valuable consideration, is indefeasible and immune from attack. However, only the subsequent purchasers of the land can rely on this proviso; (ii) After having pronounced the decision of the court and after the judgment or order on the decision had been sealed and perfected, it is not open for the court to subsequently make a further order on the suit by altering a judgment that had been pronounced, unless in situations recognised as exceptions under the law.*

CONTRACT: *Agreement – Sale and purchase agreement – Specific performance – Deceased proprietor of land entered into sale and purchase agreement with company – Administrator of land entered into sale and purchase agreement with company's director – Administrator of land later executed sale and purchase of land with another purchaser – Application by company and company's director for specific performance of sale and purchase agreement – Whether specific performance proper remedy – Specific Relief Act 1950, s. 21*

LAND LAW: *Indefeasibility of title – Registered owner – Deceased proprietor of land entered into sale and purchase agreement with company – Administrator of land entered into sale and purchase agreement with company's director – Administrator of land later executed sale and purchase of land with another purchaser – Whether purchaser bona fide purchaser for valuable consideration – Whether purchaser subsequent purchaser – Whether purchase price fully paid – Whether had priority to purchase land – National Land Code, s. 340(3)*

LAND LAW: *Sale and purchase agreement – Instruments – Deceased proprietor of land entered into sale and purchase agreement with company – Administrator of land entered into sale and purchase agreement with company's director – Administrator of land later executed sale and purchase of land with another purchaser – Whether case of void or insufficient instrument – National Land Code, ss. 207, 215 & 340(2)(b)*

EVIDENCE: *Witness – Non-calling of material witness – Adverse inference – Deceased proprietor of land entered into sale and purchase agreement with company – Administrator of land entered into sale and purchase agreement with company's director – Administrator of land later executed sale and purchase of land with another purchaser – Purchaser claimed payment made in full – Firm of solicitors that handled matter not called to testify – Whether adverse inference ought to be invoked – Evidence Act 1950, s. 114(g)*

CIVIL PROCEDURE: *Jurisdiction – Courts – High Court – Functus officio – High Court invited counsel for parties to submit on issue after delivery of decision – High Court made additional order after judgment pronounced and delivery of decision – Whether High Court already functus officio – Whether High Court had jurisdiction to modify order when judgment was delivered and perfected*

This appeal involved a dispute on land ownership. The original proprietor of the land was one Zon Idris ('deceased') and on her demise, the land was transmitted to her son, the first respondent ('first defendant') as the administrator. Prior to her death, the second appellant company ('second plaintiff') had executed a sale and purchase agreement ('SPA') ('first SPA') in 2004 with the deceased for the purchase price of RM40,000. A deposit sum of RM4,000 was paid to the deceased. In 2016, the first appellant ('first plaintiff'), who was the director of the second plaintiff, entered into another SPA with the first defendant, where the first plaintiff agreed to purchase the land for RM94,000 ('second SPA'). A deposit of RM10,000 was also paid under the second SPA. Yet another SPA on the land was inked in the same year where the second defendant agreed to purchase from the first defendant, the land for RM120,000 ('third SPA') and the land was transferred to the second defendant. The third SPA did not involve the plaintiffs. Unhappy with the turn of events, the plaintiffs filed a writ action against the defendants and pleaded that the defendants by way of the third SPA, fraudulently conspired to defeat the prior interests of the plaintiffs in the land. The plaintiffs sought an order of specific performance against the first defendant in respect of either the first or second SPA and sought for the cancellation of the third SPA and the transfer of the land to the second defendant. The first defendant contended that the second plaintiff never pursued the completion of the first SPA for more than a decade and the first plaintiff did not pay the balance purchase price of the land under the SPA, entitling the first defendant to contract to sell the land to the second defendant instead, pursuant to the third SPA. The second defendant's position was that because he was a *bona fide* purchaser who had paid the full purchase price to the first defendant which resulted in the transfer of the land as its new registered proprietor, he had the priority to purchase the land from the first defendant. The second defendant further added that there was neither collusion nor conspiracy between him and the first defendant and as he was never privy to the first or second SPA between the first defendant and the plaintiffs, no

cause of action existed to enable the plaintiffs to pursue any claims against the second defendant. The High Court (i) dismissed the claims of the plaintiffs against the second defendant; (ii) dismissed the second plaintiff's claim against the first defendant; and (iii) allowed the first plaintiff's claim for breach of contract against the first defendant. A key finding of the High Court was that the third SPA was valid and enforceable, accepting the second defendant's position that he was a *bona fide* purchaser for valuable consideration without notice. Hence, the present appeal. The issues that arose were: (i) whether the second defendant was a *bona fide* purchaser for valuable consideration – did he fully paid the purchase consideration; (ii) whether there was non-calling of material witness; (iii) whether this was a case of a void or insufficient instrument under s. 340(2)(b) of the National Land Code ('NLC'); (iv) whether specific performance should be granted to the first plaintiff for the second SPA; and (v) whether the High Court was *functus officio* when ordering refund of the deposit as damages for the first plaintiff.

Held (allowing appeal)
Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:

(1) Pursuant to s. 340(3) of the NLC, the title of a person who acquires the land in good faith for valuable consideration is indefeasible and immune from attack. However, the law is settled that only subsequent purchasers of the land can rely on this proviso. The second defendant was not a subsequent purchaser. He was an immediate purchaser in the context where fraud was alleged (but found not proven) by the plaintiffs against the defendants in relation to the transfer of the land to the second defendant. The competing claim against the title registered in the name of the second defendant was one made by the plaintiffs who were never the registered proprietors of the land. Their claim of interest in the land was merely founded through the first and second SPAs, neither of which was ever completed. The immediate owner of the land before the registration in favour of the second defendant was in fact the first defendant as the administrator. The second defendant relied much on the pleading that he had made full payment of the purchase consideration – thus as he argued, making him a *bona fide* purchaser without notice with valuable consideration in the context of the case – in defending the claim of the plaintiffs who applied for a specific performance of either the first or second SPA. However, the position of the defendants that the purchase price of the land was fully paid by cash was not established on a balance of probabilities. There was no credible and independent documentary evidence and worse, there were plain inconsistencies in the evidence given by the defendants. It would be too conveniently self-serving and perfunctory for the second defendant to rely only on the existence of an acknowledgment letter and nothing else, especially when that too was issued by the first defendant. (paras 37-40, 49 & 56)

(2) Whilst the second defendant testified that a firm of solicitors had issued the receipts for the said cash payments, no receipts were produced in court and even the firm of solicitors was not called to testify as a witness. The High Court erred in not invoking s. 114(g) of the Evidence Act 1950 when the second defendant failed to produce and call the firm of solicitors as a witness who would have had full knowledge on matters concerning the transaction, including on the payments made. The registered title in the name of the second defendant had been rendered defeasible on proof that the purchase consideration that ought to have accompanied the sale and transfer of the land was manifestly lacking and seriously in doubt. This rendered the transfer to have been inflicted with an insufficient instrument that decidedly vitiated the transfer in favour of the second defendant. (paras 57, 62 & 77)

(3) An untrue or false declaration made in the instrument of dealing in this case, more on the important subject of consideration was a clear non-observance of the procedural requirements of especially ss. 207 and 215. The relevant Form 14A was not complete in the sense envisaged by ss. 207 and 215. This would tantamount to the Form 14A being an insufficient instrument which rendered the transfer void and the title registered in favour of the second defendant – an immediate purchaser – not indefeasible under s. 340(2)(b) of the NLC. (para 101)

(4) In light of the finding that the second defendant had obtained the title of the land by means of an insufficient instrument in the absence of proof or consideration, there was no reason for the court to refuse the remedy of specific performance. Damages would not be an adequate relief despite the High Court's decision that refused the remedy of specific performance for the plaintiffs against the first defendant. The exercise of this remedy was a matter of discretion as set out in s. 21 of the Specific Relief Act 1950. The conditions for the granting of specific performance had been fulfilled and it was a proper remedy to be awarded against the defendants. (paras 105, 107 & 109)

(5) After the delivery of the decision by the High Court on 25 January 2022, the High Court had recalled counsel for the parties to submit on the question of whether the deposit that had been paid by the first plaintiff was to be refunded (after the plaintiffs had filed the notice of appeal). The High Court then on 8 March 2022 made the additional order that the first defendant refund the deposit of RM10,000. The High Court was already *functus officio* such that it no longer had the jurisdiction to modify the order when the judgment was delivered on 25 January 2022 and that it had been perfected. Therefore, once an order has been made, entered and perfected, the court had no jurisdiction to amend the order unless there had been an accidental slip in drawing up the order or unless the

order as drafted did not not correctly state what the court actually decided and intended. The part of the High Court's decision, on the payment of refund of the deposit by the first defendant to the first plaintiff and further that this be the damages payable by the first defendant to the first plaintiff, was not valid and must be set aside. (paras 110 & 112)

Case(s) referred to:

Ab Latef & Associates (M) Sdn Bhd v. Govindasamy Suppiah [2016] 10 CLJ 1 CA ***(refd)***
Affin Bank Bhd v. WT Low & Ng Realty Sdn Bhd [2003] 1 CLJ 674 HC ***(refd)***
Appoo Krishnan v. Ellamah Ramasamy [1974] CLJU 8; [1974] 1 LNS 8 HC ***(refd)***
Armagas Ltd v. Mundogas SA (The Ocean Frost) [1985] 1 Lloyd's Rep 1 ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarlous George Fernandez & Anor And Another Case [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50 SC ***(refd)***
He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***
Herrington v. British Railways Board [1972] AC 877 ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1980] CLJU 92; [1980] 1 LNS 92 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Lee Chee Keong v. Fadason Holdings Sdn Bhd & Other Appeals [2017] 7 CLJ 295 CA ***(refd)***
Mook Meng Sun v. Loo Aa Kau & Ors [2002] 2 CLJ 142 HC ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58 CA ***(refd)***
Ooi Siew Eng & Ors v. Link Ventures Sdn Bhd (In Liquidation) & Another Appeal [2018] 5 CLJ 668 CA ***(refd)***
Puran Singh v. Kehar Singh Bahadur Singh [1937] CLJU 51; [1937] 1 LNS 51 CA ***(refd)***
Stone World Sdn Bhd v. Engareh (M) Sdn Bhd [2020] 9 CLJ 358 FC ***(refd)***
Subramaniam Muniandy v. Letchumi Thasan & Ors [2021] 5 CLJ 331 CA ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tan Hee Juan By His Next Friend Tan See Bok v. Teh Boon Keat And Lai Soon [1933] CLJU 101; [1933] 1 LNS 101 HC ***(refd)***
Tan Tock Kwee & Anor v. Tey Siew Cha & Anor [1995] 4 CLJ 658 HC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] CLJ 119; [1979] 1 LNS 119 FC ***(refd)***
Toh Huat Khay v. Lim A Chang [2010] 7 CLJ 261 FC ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)
National Land Code, ss. 207, 208, 209, 210, 211, 215, 301, 336(1)(a), 340(2)(b), (3), 338(1)
Specific Relief Act 1950, ss. 11, 18, 21

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For the 1st defendant - Kemala Alang; M/s Balasingam & Co
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[Editor's note: For the High Court judgment, please see Jalani Mohamed & Anor v. Shahrom Abdullah & Anor [2022] CLJU 691; [2022] 1 LNS 691 (overruled).]

Reported by Lina E

JUDGMENT

Mohd Nazlan Ghazali JCA:

Introduction

[1] This appeal involved a dispute on land ownership, which had been subjected to a number of sale and purchase agreements as well as transfers which the two appellants, as the plaintiffs at the High Court were unsuccessful in their claim for specific performance.

[2] Having heard the appeals, examined the appeal records and considered the submissions by parties, we unanimously decided to allow the appeal and set aside the judgment of the High Court.

[3] These grounds of judgment contain the full reasons for our decision. For convenience, the parties will be referred to as they were at the High Court.

Key Background Facts

[4] The subject of this dispute is a piece of land held under G3474 (previously HS(M) 1868), Lot 4241, Mukim Sungkai, Daerah Batang Padang ("the land"). The first plaintiff, who is the first appellant herein, is a director of the second plaintiff company (the second appellant). The former also asserted to be a nominee of the latter.

[5] It is not disputed that the original proprietor of the land was one Zon binti Idris ("the deceased"). On her demise, the land was claimed to have been transmitted to his son, the first defendant (the first respondent herein) as administrator. Prior to her death however, the second plaintiff company had executed a sale and purchase agreement dated 7 August 2004 with the deceased ("the first SPA"), wherein the second plaintiff had agreed to purchase the land for RM40,000. A deposit sum of RM4,000 had also been paid to the deceased.

[6] The first plaintiff then, many years later, entered into another sale and purchase agreement, this time dated 8 July 2016 with the first defendant as administrator wherein the first plaintiff had agreed to purchase the land for a higher consideration of RM94,000 ("the second SPA").

[7] The second SPA, according to the first plaintiff, was 'a continuation' of and pursued on the basis of the first SPA, and executed by him as nominee of the second plaintiff company as the demise of the deceased delayed the completion of the first SPA and the transfer never materialised. A deposit of

RM10,000 had been paid under the second SPA. The first plaintiff with a fellow director of the second plaintiff company had also lodged a private caveat on the land not long before the entry of the second SPA on 2 March 2016.

[8] Yet another sale and purchase agreement on the land was inked not long after in the same year – on 2 December 2016 – between the first defendant and the second defendant (the second respondent herein) whereby the second defendant had agreed to purchase from the first defendant, the same subject matter – the land – for RM120,000 ("the third SPA"). The third SPA, which unlike the first two, did not involve either of the plaintiffs as a party, resulted in the transfer of the land to the second defendant. The first plaintiff claimed he had no knowledge of the execution of the third SPA.

[9] Following the execution of the third SPA between the first defendant and the second defendant, the latter had by way of an originating summons successfully on 13 April 2018 removed the private caveat lodged by the first plaintiff, which removal the latter contended was effected without notice to him. The issue document of title to the land was issued in the name of the second defendant as proprietor on 20 April 2018.

[10] Unsurprisingly unhappy with the turn of events, the plaintiffs filed the instant writ action against the defendants. The plaintiffs pleaded that the defendants by way of the third SPA fraudulently conspired to defeat the prior interests of the plaintiffs in the land which they said was evidenced by the second SPA. Primarily, they sought an order of specific performance against the first defendant in respect of either the first SPA or the second SPA, and the land be transferred to either of them in consequence. The other key relief prayed for was for the third SPA and the transfer of the land to the second defendant to be cancelled.

[11] The first defendant contended that the second plaintiff never pursued the completion of the first SPA for more than a decade, and that the first plaintiff did not cause the payment of the balance purchase price of the land under the second SPA, entitling the first defendant to thereafter contract to sell the land to the second defendant instead, pursuant to the third SPA which was then duly completed including after having received the requisite regulatory approvals, as well as the full purchase price.

[12] The second defendant's position is that because he was a *bona fide* purchaser who had paid the full purchase price by cash to the first defendant which resulted in the transfer of the land as its new registered proprietor, he therefore had the priority to purchase the land from the first defendant. There was neither collusion nor conspiracy between the first defendant and the second defendant, and that as he was never privy to the first SPA or the second SPA between the first defendant and the plaintiffs, no cause of action existed to enable the plaintiffs to pursue any claims against the second defendant.

The Decision Of The Trial Court

[13] The High Court dismissed the claims of both plaintiffs against the second defendant. The second plaintiff's claim against the first defendant was also dismissed, but the first plaintiff's claim for breach of contract against the first defendant was allowed, as it was found that the second SPA was valid and that the first defendant had breached the same by proceeding to execute the third SPA with the second defendant and transferring the land to the latter. Damages in the amount of RM26,000 being the difference between the sale price under the third SPA and that of the second SPA was (subsequently) ordered to be paid by the first defendant to the first plaintiff.

[14] In particular it was determined that the plaintiffs' claim, in so far as it was founded on the first SPA, was statute barred by reason of limitation. The High Court also held that the two caveats lodged by the plaintiffs were in respect of the first SPA, not the second SPA. It was further ruled by the High Court that the second SPA was entered into by the first plaintiff in his personal capacity and not as a nominee for the second plaintiff company. Evidence did not show that such a relationship existed.

[15] Additionally, the second defendant's mere knowledge of the second plaintiff's claim against the land pursuant to the first SPA was not fraud. The second defendant was however not aware of the first plaintiff's interest in the land under the second SPA as the first defendant's evidence is that, to the first defendant, the plaintiffs' claim was premised on the first SPA and given the fact that the first plaintiff did not lodge a caveat to protect his interest under the second SPA.

[16] The second defendant was found not to have been aware of the first plaintiff's interest in the land pursuant to the second SPA, and that importantly, the plaintiffs had failed to prove that the first and the second defendants had defrauded or conspired to defeat the plaintiff's interests in the land. And there was no evidence of any dishonest attempt by the second defendant to deprive the first plaintiff of the latter's claim to the land under the second SPA. Significantly, the second defendant's testimony in respect of the payments he claimed to have made towards account of the purchase consideration for the land was also accepted by the High Court.

[17] In relation to the competing interests between the first plaintiff who had entered into a valid agreement in respect of the land in the second SPA and the second defendant who had lawfully purchased the land pursuant to the third SPA, the plaintiffs were adjudged never to have had any registrable interest in the land given the non-completion of the second SPA (as well as the first SPA) following non-payment of balance purchase consideration, as against the second defendant who is currently registered as the registered proprietor on the title to the land.

[18] Dissatisfied, the plaintiffs turned to this court. Hence, this appeal before us. A

Principles On Appellate Intervention

[19] It is well-established in law that an appellate court will not interfere unless the trial court is shown to be plainly wrong. The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, in the judgment written by Azahar Mohamed FCJ (later CJM) reaffirmed the principle to be followed by an appellate court when reversing findings of fact by a trial court: B

> [60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (at p 10) per Steve Shim CJ (Sabah & Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v. Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p 800: C D
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> > It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309). E

[20] This court in *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58 in the judgment of the court delivered by Harmindar Singh JCA (now FCJ) held thus: F

> [20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are: G
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> > (a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal* [2010] 3 CLJ 377; [2010] 3 MLJ 509);
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> > (b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 6 MLJ 1); H
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> > (c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1); I

(d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd* [2008] 2 CLJ 284; [2008] 2 MLJ 87);

(e) where the trial judge was plainly wrong in arriving at his decision (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97);

(f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd* [2013] 1 LNS 625; [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40; [1984] 2 MLJ 165); and

(g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 1 LNS 1416; [2012] 4 MLJ 149).

[21] In a more recent Federal Court pronouncement on the principles surrounding appellate intervention in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 which cited the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, it was reaffirmed that the position has always been that a decision which is arrived at due to a lack of judicial appreciation of evidence is plainly wrong.

Main Grounds Of Appeal

[22] The essence of the plaintiffs' grievance is that High Court misdirected itself and committed several errors of findings of fact and of law, and on the whole failed to judicially appreciate the totality of the evidence in this case, thereby warranting appellate intervention. In particular, it was contended that evidence did not show that the purchaser of the land under the third SPA – the second defendant, who must have known about the prior interest of the plaintiffs in the land pursuant to either of the first SPA or the second SPA, had fully paid the purchase price of the land to justify the transfer of the same in his favour by the first defendant. This was a fraudulent conspiracy between the defendants to deny the interests of the plaintiffs which justified specific performance of the second SPA and the cancellation of the registration of the ownership of the land in the same of the second defendant pursuant to the third SPA.

[23] We will examine the primary issues raised by the plaintiffs in their memorandum of appeal next.

Analysis And Findings Of This Court

Whether The Second Defendant Is A Bona Fide Purchaser For Valuable Consideration – Did He Fully Pay The Purchase Consideration

[24] A key finding of the High Court is that the third SPA was valid and enforceable, accepting the second defendant's position that he was a *bona fide* purchaser for valuable consideration without notice. The plaintiffs submitted that the title to the land was instead registered and obtained as a result of a fraudulent conspiracy between the defendants as buyer and seller. By this, the plaintiffs primarily meant that the second defendant did not give any reasonable explanation at the trial, and failed to produce relevant documentary evidence to substantiate the assertion that cash payment for the consideration under the third SPA had been made. In other words, the second defendant did not establish that he had, as purchaser of the land, paid valuable consideration for the purchase. The plaintiffs argued that the second defendant was not a *bona fide* purchaser and his title to the land should be set aside.

[25] The second defendant on the other hand argued that that the full purchase price of RM120,000 under the third SPA had been paid by the second defendant and that the land had been transferred to the second defendant was confirmed by the first defendant. This was made amply clear from the first defendant's oral evidence at trial and by the production of an acknowledgement letter dated 17 May 2017 whereby the first defendant, as the vendor under the third SPA acknowledged receipt of the full consideration for the sale of the land ("the acknowledgement letter").

[26] The second defendant referred to a decision of the Court of Appeal in *Lee Chee Keong v. Fadason Holdings Sdn Bhd & Other Appeals* [2017] 7 CLJ 295; [2017] 3 MLJ 728, in particular to the following self-explanatory headnote of the reported judgment, as follows:

> (1) There was no basis for the trial court to have rejected the oral evidence of the appellants that they had fully paid the purchase price in cash and to have insisted on corroborative evidence. There was no suggestion the appellants were not capable of financing the purchases. The appellants had testified in detail as to how the total sums were raised. The totality of the evidence, both oral and documentary, overwhelmingly established the appellants' claims (see paras 49, 52 & 80).

[27] For proper context it is useful to refer to the background facts of that case to show its relevance to the instant case before us. The appellant house-buyers in *Lee Chee Keong* (*supra*) entered into a tripartite sale and purchase agreements with the respondent developer and landowner, the Kuala Lumpur City Hall (DBKL). The respondent's then managing director, one Lee Chee Thing ("LCT"), signed the SPAs on behalf of the respondent. Under the SPAs, the respondent had to obtain the issue of separate

documents of title to the properties and have the properties transferred to the appellants. However, this did not happen, and the respondent terminated all the SPAs instead.

[28] The appellants' case in their suit for specific performance of the SPAs against the respondent was that they had paid the purchase price of the houses in full and in cash after accepting the respondent's offer (through LCT) of a 10% discount off the original prices of the houses if cash payment was made. They asserted that they had raised the monies from their own savings and from borrowings and paid the purchase prices to LCT at the respondent's office after which LCT issued them and their solicitors' letters ("the letters"), bearing the respondent's letterhead and his signature, acknowledging the payments, confirming that the keys to the houses had been handed over to them, as well as confirming the fulfillment of certain undertakings.

[29] The respondent counterclaimed, alleging fraud and conspiracy between the appellants and LCT to defraud the respondent given that the respondent did not have any record of the SPAs let alone of having received any purchase price from the appellants. After trial, the High Court found both the appellants' claims and the respondent's counterclaim for fraud and conspiracy unproven and dismissed them both, but ordered the properties to be returned to the respondent.

[30] Of particular interest to the instant case is that the High Court in *Lee Chee Keong* (*supra*) held that, since the appellants failed to prove they had fully paid the purchase price, they were not entitled to an order of specific performance. The appellants could not merely rely on the letters to claim they had fully paid the purchase price because the letters were signed by LCT as an alleged co-conspirator to defraud the respondent such that such documents had little or no probative value.

[31] It was further held by the trial court in that case that the appellants should have tendered other independent evidence to show how they had raised the purchase price monies and to show payment had been made to LCT. However, the High Court found that there was no documentary evidence to show monies had been withdrawn from bank accounts; none of the appellants' friends, relatives or family members from whom they had allegedly taken loans were called to testify and there was also no evidence of repayments of loans.

[32] On appeal though, this decision was set aside. The Court of Appeal ruled, *inter alia*, that the High Court had erred in finding that the letters were of limited evidentiary value. It was held that once the respondent's claim of conspiracy and fraud was determined not to have been established, there was no longer any issue of LCT being the co-conspirator to weigh against any reliance on the letters. The appellants were thus entitled to rely on the letters

as evidence of their claim and the trial court ought to have examined the contents of those letters and evaluated them against any other evidence before the court. In the absence of any evidence to the contrary, the appellants' contention that LCT had offered them a discount stood. The trial court should not have disbelieved the appellants' claim of payment in cash terms. Furthermore, the truth and authenticity of the contents of the SPAs were never challenged.

[33] As such, reverting to the instant case before us, the defendants argued that the High Court was correct in finding the absence of any fraud or conspiracy on the part of the defendants against the plaintiffs in respect of the transactions concerning the land, and in accepting the sufficiency of the evidence of payment of the full purchase price based only on the testimony of the two defendants as well as on the acknowledgement letter issued by the first defendant.

[34] We pause to remind ourselves that in the final analysis every issue that requires judicial determination on a finding of fact is invariably a matter of proof, based on the facts and circumstances of each case. The legal concepts of burden of proof and standard of proof are well-settled in law and are applicable to identical extent in all cases. However what determines the outcome of a case involves the application of the law, including such basic concepts on burden and standard of proof, to an interplay between the question or issue to be decided on and the facts and circumstances of the case.

[35] We should state at the outset that based on our review of the appeal record, we would agree with the High Court that fraud and conspiracy could not be proven against the defendants. We also observe that in this appeal, the plaintiffs were not focussing on pursuing this allegation. The more pertinent ground of appeal is in respect of proof of payment of the purchase price of the land pursuant to the third SPA by the second defendant.

[36] In our view, the one primary reason why we think that cogent evidence of payments in the instant case is necessary is that unlike in *Lee Chee Keong* (*supra*) the context and the factual matrix of this case concerns a purchaser of land, like the second defendant herein is asserting, in the face of a competing claim of ownership interest in the said land, that he was a *bona fide* purchaser for valuable consideration. *Lee Chee Keong* (*supra*) involved only a contractual breach claim. Here, the breach of contract also transcends into a dispute on competing interests in land, *albeit* yet to be registrable. The second defendant's defence that he was a *bona fide* purchaser at first blush appears to have relevance to the proviso housed in s. 340(3) of the National Land Code. The entirety of s. 340 states as follows:

340 Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

(emphasis added)

[37] For present purposes, it suffices for us to say that pursuant to the proviso to sub-s. (3) of s. 340 of the NLC, the title of a person who acquires the land in good faith for valuable consideration is indefeasible and immune from attack. This appears to be the contention of the second defendant.

[38] However, the law is now settled that only subsequent purchasers of the land can rely on this proviso – which is the deferred indefeasibility concept – as ruled by the Federal Court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1. The second defendant is not, on the facts of the

instant case, a subsequent purchaser. He is an immediate purchaser, in the context where fraud was alleged (but found not proven) by the plaintiffs against the defendants in relation to the transfer of the land to the second defendant.

[39] The competing claim against the title registered in the name of the second defendant is one made by the plaintiffs who were never the registered proprietors of the land. Their claim of interest in the land was merely founded through the first SPA and the second SPA neither of which in any event was ever completed. The immediate owner of the before the registration in favour of the second defendant was in fact the first defendant (as administrator).

[40] But the greater point we wish to make is that, the second defendant did rely much on the pleading that he had made full payment of the purchase consideration – thus as he argued, making him a *bona fide* purchaser without notice with valuable consideration in the context of the case – in defending the claim of the plaintiffs who applied for a specific performance of either the first SPA or the second SPA.

[41] As such, even though strictly s. 340(3) may not be applicable here (because the second defendant is not a subsequent purchaser), the prayers asked for by the plaintiffs, if allowed, would witness the cancellation of the transfer of the land to the second defendant and the making of a new transfer of the land to either the first plaintiff or the second plaintiff following the order of specific performance. In light of these, to our mind, it is imperative that evidence of full payment be both cogent and convincing, and pass muster the threshold of proof on a balance of probabilities.

[42] Reverting to the key issue of payment of purchase price, this court in a more recent decision in *Subramaniam Muniandy v. Letchumi Thasan & Ors* [2021] 5 CLJ 331, a case which concerned s. 340(3) of the NLC, did examine the evidence of payment by a subsequent purchaser of land to ensure that the requirement on valuable consideration was met, and held that oral assertion alone that payments had been made would not suffice. The following passages of the judgment of the court delivered by Abu Bakar Jais JCA (now FCJ) merit reproduction:

> [72] Based on the case above, there are clearly two conditions for a subsequent purchaser, *ie*, the second respondent to satisfy for the title of the land to be indefeasible. These are as follows:
>
> (i) proving there was valuable consideration; and
>
> (ii) proving good faith in the conveyance of the land.
>
> [73] In fact, these conditions are stipulated in the proviso to s. 340(3) of the NLC as shown earlier.

A [74] Thus, following the above case and the statutory provision stated, the second respondent has the duty to prove that she paid the first respondent RM150,000 as valuable consideration for the land and there was indeed good faith on her part in the conveyance of the land to her. Otherwise, she has no indefeasible title to the land.

B [75] Of importance to be taken into account regarding the first requirement above, is the fact that RM150,000 is also not a small amount but quite a substantial amount to be handed over to the first respondent. For that amount, the second respondent said she paid the first respondent RM50,000 in cash as deposit. This is also highly unlikely because one would not normally carry that much cash around. She said C she pawned her jewellery for part of this amount. However, there is no proof for this amount being paid including the pawning of her jewellery because the pawn receipts do not tally with the amount stated. There is also no proof that a receipt or any acknowledgment was issued by the first respondent to the second respondent for this substantial amount of RM50,000 as deposit. There is also no proof for the balance sum paid of D RM100,000 despite the second respondent saying she borrowed from a few persons to make the payment. *As stated earlier, for a substantial amount like this, we should not just rely on oral evidence, in this instance coming from the second respondent, saying such amount has been paid. There should also be documentary proof for a large amount of the balance sum. Again, regrettably, there is also no documentary proof for this payment shown by the second respondent. It* E *is only prudent to look for documentary proof to support the mere oral evidence coming from the second respondent, saying such amount has been paid. In the absence of such documentary proof, on the balance of probabilities, it can be inferred that payment was never made by the second respondent.* (emphasis added)

[43] In the instant case, the only documentary evidence supporting the oral F evidence of both defendants (buyer and seller) on payment was the acknowledgement letter by the first defendant on receipt of such payment. This was a full payment of the total purchase consideration made by the second defendant in cash.

G **[44]** Again, we stress that the second defendant in the appeal before us is not a subsequent purchaser, but the immediate purchaser of the land from the first defendant. As such the proviso in s. 340(3) does not apply.

[45] It is clear that s. 340(2) of the NLC sets out the circumstances in which a registered title can be rendered defeasible and set aside. Section 340(3) H however states that a subsequent registered title which is acquired from a preceding owner of registered title who gets onto the register by means of one or more of the vitiating situations set out in s. 340(2) of the NLC shall be protected if the subsequent registered title is acquired in good faith for valuable consideration.

I

[46] In the event any of the situations set out in s. 340(2)(a) or (b) – forgery, void or insufficient instrument is established, the registered title will be defeasible and will remain so even if the registered proprietor was not a party or privy to the forgery, void or insufficient instrument or that he acted in good faith and provided good value for the title. The proviso concerning good faith and for valuable consideration embodied in s. 340(3) has no application to this case. It will apply only to a purchaser who subsequently buys from a registered proprietor whose title or interest is defeasible under s. 340(2). The second defendant in the appeal before us, we reiterate, is not a subsequent purchaser. As such, if any of the situations in s. 340(2) is proven, his title on the land is defeasible regardless of his involvement (if any) in any of the said situations and notwithstanding even if he could show he was a *bona fide* purchaser who had given valuable consideration in his purchase of the land.

[47] On whether s. 340(2) is triggered in this case, reverting to the key question of whether the second defendant, as the purchaser of the land under the third SPA did in fact make payment of the purchase consideration to the first defendant as vendor, we observe that despite the fairly substantial sum of RM120,000 being the purchase consideration, there were absolutely no other, more independent evidence of the making by the second defendant, and the receiving by the first defendant, of such cash payment such as documentary evidence including in the form of cheques, invoices and payment voucher with acknowledgment, as was held to be essential in the case of *Subramaniam Muniandy* (*supra*). The defendants, as related to earlier, proffered absolutely no evidence to such effect.

[48] In this regard, the importance of contemporaneous documents cannot be emphasised enough. We are in this context reminded of the salutary observation by Chang Ming Tat FJ on the importance and value of contemporaneous acts and documents, and the need to test oral testimonies against them, who in the case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] CLJU 119; [1979] 1 LNS 119; [1979] 2 MLJ 229, expressed as follows:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings.* Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ... (emphasis added)

[49] In our assessment, an evaluation of the acts and the lack of documents contemporaneous with the event, when tested against the evidence given by the witnesses in this case, particularly the defendants would lead to the compelling finding that lends greater credibility to the case of the plaintiffs. It would be too conveniently self-serving and perfunctory for the second defendant to rely only on the existence of the acknowledgment letter, and nothing else, especially when that too was issued by the first defendant.

[50] We are also reminded of the decision of the Supreme Court in the case of *Eastern & Oriental Hotel (1951) Sdn Bhd v. Ellarlous George Fernandez & Anor And Another Case* [1988] 2 CLJ 734; [1988] 1 CLJ (Rep) 50, particularly the judgment written by Wan Hamzah SCJ who had approvingly referred to the following observation made in the case of *Armagas Ltd v. Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witness' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

[51] Other observations on the issue of payment ought to be stated. First, the second defendant testified that payments were made on his behalf by his solicitors but he did not furnish any evidence such as receipts of payments from his solicitors. Secondly, the second defendant also did not explain why he had chosen to settle the purchase price by cash, instead of adhering to the terms of the third SPA (which original was not even produced before the trial court), which provided that pursuant to cl. 4.1 (c), the balance purchase price shall be paid by the second defendant (as purchaser) to the first defendant's (the vendor) solicitors as stakeholder. Clearly, if what the defendants claimed about the making of the payment was true, they did not follow the relevant terms of the third SPA, which therefore does little to support the case of the defendants. But even if it was accepted that the defendants as the contracting parties to the third SPA could agree to a different method of completing the sale of the land in departure from the standard conveyancing practice as reflected in the said cl. 4.1 (c), among other things, their conflicting accounts of how payment of the purchase price had been made, as will be further discussed, would pose serious doubts on the truthfulness of their testimonies.

[52] Thirdly, this is not to mention that the acknowledgment letter did not attach nor even refer to any receipts and did not state why cash payments had to be made against the terms of payment under the third SPA. More problematically, the letter was actually dated 17 May 2017, some one year and three months after the date of the alleged payment of deposit on 3 December 2016. It was not contemporaneous. Even the second respondent agreed that the acknowledgment letter was only prepared by Messrs Mah Yut Choy on 17 May 2017 and there was no acknowledgment relating to the transaction by way of cash payment signed by the first defendant.

[53] Fourthly, the first defendant on his part had never disputed that the purchase price had been paid in full to him by the second defendant. The former even testified, that he had distributed the said monies amongst his siblings; but conveniently, without any evidence to substantiate this.

[54] Further, there is also conflicting evidence given by the two defendants in respect of the payment of the purchase price. The first defendant stated that RM60,000 deposit had been made at the firm of solicitors – Messrs Mah Yut Choy. The second defendant, on the other hand testified that the payment was made at the land office. Yet the other inconsistency is that the second defendant himself incredulously did not know where he got the money to pay the purchase price by way of cash. In fact, the second defendant initially gave evidence that the cash payments were withdrawn from his wife's bank account. But when he was asked to produce his wife's bank statements, the second defendant said that he could not recall where he actually got the cash money to pay to the first defendant.

[55] Despite the first schedule to the third SPA (at No. 11) stating that the second defendant had on execution date paid RM60,000 as part of deposit payment, the second defendant testified that a higher sum of RM80,000 had been paid to the first defendant as at 22 September 2016. The second defendant then said that he had made the first cash payment of RM20,000 but further changed his testimony, reverting to the version that he had paid RM60,000 as first payment. It is an understatement to say that his testimony did not inspire confidence.

[56] As such, the position of the defendants that the purchase price of the land was fully paid by cash was in our view not on a balance of probabilities established. There was no credible and independent documentary evidence, and worse, there were plain inconsistencies in the evidence given by the two defendants. This does not justify the order made by the High Court.

[57] Not only that, whilst the second defendant testified that Messrs Mah Yut Choy had issued the receipts for the said cash payments, as mentioned, no receipts were produced in court, and even the solicitor was not called to testify as a witness. This related issue requires further analysis, it being another ground of appeal of the plaintiffs.

Whether There Was Non-calling Of A Material Witness

[58] Related to the first ground of appeal as discussed above, the plaintiffs as the appellants herein also submitted that the second defendant failed to call a material witness during the trial – one Mr Mah Yut Chow ("MYC") – who was the solicitor from Messrs Mah Yut Choy handling the matter of the third SPA, thus responsible for the preparation of all documents pertaining to the third SPA. The complaint of the plaintiffs in this appeal is that there was a misdirection by the High Court in its decision not to invoke an adverse inference under s. 114(g) of the Evidence Act 1950 against the second defendant, for not producing MYC at the trial.

[59] Not only did the trial court ask that MYC discharge himself from acting for the second defendant, for he was supposed to be the material witness for the case. MYC was the one who prepared the sale and purchase agreement dated 2 December 2016 and all the letters dated 17 May 2017, 22 September 2016 and 3 February 2016 that had been exhibited as D2, D3 and D4, respectively, and challenged as fabricated documents by the plaintiffs.

[60] The defendants' riposte to this argument is that the first defendant as the vendor had admitted that he had received the full purchase price, as further supported by the acknowledgement letter. The second defendant too testified that he had made full payment of the purchase price for the land to the first defendant. There was therefore no good reason to put MYC on the stand.

[61] The second defendant maintained that the letter of sale and purchase agreement dated 3 February 2016 was admitted as evidence and marked as exh. D4. And similarly, exhs. D2 and D3 were also admitted as evidence as they were tendered through its maker, the first defendant himself. There was no necessity for these to have been tendered through the solicitor who prepared them, MYC, when these documents had been properly tendered through its maker, namely the first defendant. There is also no evidence to suggest that the acknowledgement letter (D2), the first defendant's acknowledgement of receipt of RM20,000 of 22 September 2016 (D3) or the letter of sale and purchase dated 3 February 2016 (D4) were fabricated as alleged by the plaintiffs.

[62] We are however, inclined to agree with the contention of the plaintiffs that the High Court had erred in not invoking s. 114(g) of the Evidence Act 1950 when the second defendant had failed to produce and call the solicitor, MYC as a witness who would have full knowledge on matters concerning the transaction, including on the payments made, and despite a challenge made during the cross-examination of the defendants among others, that the documents were forged, and on their failure to produce during trial, the original sale and purchase agreement – the third SPA.

[63] As per the notes of evidence, the first defendant (SD1) testified as follows:

> Mano: Melihat pada surat encik Jalani di muka surat 199, D2 Yang Arif. 199 ya encik Shahrom. Melihat pada surat ini kamu telah menyatakan kamu telah terima deposit tunai sebanyak RM60,000.00 pada 3.2.2016. Saya cadangkan sebenarnya wang ini kamu tidak terima.
>
> SD1: Saya terima.
>
> Mano: Terima di mana?

Hakim: Sila ulang soalan encik Mano.

Mano: Soalan saya Yang Arif. Kamu telah menyatakan kamu telah terima deposit tunai sebanyak RM60,000.00 pada 3.2.2016. Saya cadangkan sebenarnya wang ini kamu tidak terima.

SD1: Saya terima wang ini.

Mano: Tidak setuju lah.

Hakim: Dia kata dia terima?

Mano: Dia terima. Di mana encik terima wang ini?

SD1: Di pejabat peguam.

Mano: Pejabat peguam Mah Yut Choy?

SD1: Ya.

[64] We are of the view that given the challenge levelled against the defendants particularly on whether payment of purchase price had actually been made by the second defendant, and the conflicting testimonies relevant to that issue as highlighted earlier, only MYC, as the solicitor in charge of the transaction, and who was the very person who prepared the third SPA could clarify the true position and explain the acknowledgement letter (exh. D2), the first defendant's acknowledgement of receipt of RM20,000 of 22 September 2016 (D3) or the letter of sale and purchase dated 3 February 2016 (D4).

[65] We are in agreement that the High Court did not sufficiently consider the fact that it was the High Court who during trial had advised the solicitor for the second defendant, MYC to discharge himself from acting on behalf of the second defendant as MYC could be a material witness who would be in a position to explain all the contradictions in the testimonies of the defendants, as well as the documents prepared by MYC himself in relation to the purchase of the land under the third SPA. This advice was given during the cross-examination of the second defendant, clearly in light of the contradictions in evidence and the allegations by the plaintiffs of transaction being fraudulent, and the relevant documents forged.

[66] However, as it finally transpired, MYC was never called as a witness. We cannot but agree that despite the discharge by MYC as counsel, the non-invoking of an adverse inference under s. 114(g) of the Evidence Act 1950 on the non-calling of MYC as a witness by the second defendant constituted a serious misdirection on the part of the High Court, especially when the second defendant himself had testified that only MYC could explain about the preparation as well as the purport and import of all conveyancing and related documents on the purchase of the land by the second defendant in the third SPA.

[67] There is therefore much force and substance in the contention that if MYC had attended and given evidence as a witness his testimony would not have been consistent with that of the defendants. In other words, if MYC had testified, it is more likely than not that his testimony would be contradictory to and not in favour of the case of the defendants at trial.

[68] Reference in this regard may be made to the decision of the Federal Court in *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751. In that case, the appellant and the first respondent who were business partners decided to acquire a shop house in which they operated their restaurant business. The case of the appellant was that the property was to be purchased and registered in the joint names of herself and the first respondent in equal shares and she had made her contribution towards the purchase price. But the first respondent had purchased the property and registered it in her sole name. The first respondent then sold the property to the second respondent company. The appellant sued the first respondent to establish that she was the beneficial owner of the property.

[69] The Federal Court disagreed with the concurrent findings of the High Court and the Court of Appeal and ruled that the appellant was entitled to a half share in the shop lot as a trust property as a beneficiary under a constructive trust. The Federal Court had also to deal with one issue which was that the first respondent never gave any evidence and only the appellant testified on the terms of the arrangement and about the sums of money she had provided and the purpose for which they were provided. Gopal Sri Ram FCJ held as follows:

> [5] *Sarkar on Evidence* (16th Ed) at p 1837 states:
>
> > It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case *Gurbakhsh v. Gurdial* AIR 1927 PC 230.
>
> [6] In the present instance, there is no doubt that the first respondent had intimate knowledge of the material facts relevant to the dispute and that she was privy to the several steps through which the transaction had proceeded. Based on the authorities already cited, it is patently clear that the trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. This, the trial judge clearly omitted to do …

[70] It is true that unlike in *Takako Sako* (*supra*) where the second respondent, a party to the suit did not testify, in the instant case before us both the defendants did give evidence. But the problem is that the two defendants in this instant case before us, whilst they did testify, however gave

conflicting evidence on the critical issue of the payment of the purchase consideration of the land. This would therefore necessitate the evidence of MYC, the solicitor previously appointed by the second defendant who was undoubtedly responsible for the handling of the purchase transaction of the land, and who must have been familiar with the relevant documentation. We reiterate that even the second defendant himself confirmed at the trial that only his lawyer, MYC who could explain matters relating to the purchase transaction under the third SPA.

[71] Relevantly, in respect of non-calling of witnesses by a party to a suit, in *Takako Sakao* (*supra*) reference was also made to the speech of Lord Diplock in *Herrington v. British Railways Board* [1972] AC 877, the pertinent parts of which read as follows:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

[72] In the case of *Ab Latef & Associates (M) Sdn Bhd v. Govindasamy Suppiah* [2016] 10 CLJ 1, one of the issues before the Court of Appeal was the credibility of the evidence concerning a contention by a witness that he had returned a sum of money to the respondent in relation to a land sale transaction. The problem was that the latter instead claimed that the payment by the witness was a loan that the respondent had procured from one Paramaseevan through the said witness. However, the respondent did not offer any documents in support. Neither did he call Paramaseevan. The Court of Appeal, on this point, ruled as follows:

> [30] We shall next turn to consider the ancillary issues. The learned judge doubted DW1's evidence that he had returned RM145,000 to the respondent out of RM310,000 that the respondent had given him. According to DW1, he only spent part of the sum of RM310,000 to purchase the said property and returned RM145,000 to the respondent in 2006. It was not disputed that DW1 had paid this sum to the respondent in two payments. Exhibits D22 and D23 which are the Public Bank remittance application form and Standard Chartered deposit voucher respectively, clearly proved the payments of the said sums to the respondent's account. The respondent did not deny that these two payments were made by DW1. However he pleaded that the payments were in fact for a loan which he had obtained from one Paramaseevan through DW1 which loan he had settled together with interest. In spite of that, we find that the respondent could not provide any proof that the

> sum of RM145,000 was indeed from the alleged loan transaction. It was in evidence that Paramaseevan was his neighbour and acquaintance back in his hometown in Port Dickson. The alleged loan repayment to Paramaseevan was made by the respondent in Port Dickson. It is somewhat perplexing though, that, if he could make repayment directly to Paramaseevan why did the respondent have to borrow the money from Paramaseevan who was his neighbour and friend through DW1. The person who could confirm about the loan was Paramaseevan himself. *However the respondent we observe, failed to call Paramaseevan, who was essential to the unfolding of the narrative upon which the respondent's case was based as far as this issue was concerned, to testify. Such failure in our opinion, will attract the invocation of the presumption of adverse inference under s. 114 illustration (g) of the Evidence Act 1950 against him …* (emphasis added)

[73] We accordingly find that the non-calling of MYC justified the drawing of an adverse inference against the defendants, particularly the second defendant. The High Court was in error for not making that finding.

[74] There is also the allegation that on the successful removal of caveat application filed by the second defendant that he had failed to justify why the letter of sale and purchase agreement dated 3 February 2016 was not exhibited as part of document on the removal of caveat application. The second plaintiff had entered a private caveat No. 399/2017 on the land on 8 June 2017, upon finding that an earlier (first) caveat had been removed without the first plaintiff's knowledge. No explanation was given by the second defendant for the absence of the document in this removal application of the second caveat. This led the plaintiffs to contend that the alleged letter was a forged document that was specifically created to justify of the existence of agreement to purchase the land between the first defendant and the second defendant. And this was prior to the date the first plaintiff entered into the second SPA with the first defendant on 8 July 2016. This according to the plaintiffs cast doubt on the said document. Instead, the second defendant merely stated in court that only MYC could clarify on the same as he was the person who prepared the document.

[75] The said exhs. D2, D3 and D4, we stress, were prepared by the solicitor, MYC but he was not called as the witness during the trial. We need do no more other than refer to the following observation by Raus Sharif FCJ (later Chief Justice) in the case *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785:

> [36] It is fundamental that it is the requirement of the best evidence rule that the maker of a document must be called to prove it. (*Allied Bank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33). Further, s. 73A of the Evidence Act states that in civil proceedings, the maker must be called as a witness in order to render it admissible in evidence. (*Ooi Yoke In (f) & Anor v. Public Finance Berhad* [1993] 2 CLJ 464). And a document

cannot be admitted into evidence and marked as such until properly proven. (*Chong Khee Sang v. Phang Ah Chee* [1983] 1 LNS 57). In the instant case, it is clear that both the subcontract and the fax were not properly proven and should have been disregarded.

[76] On the totality of evidence, it is clear beyond peradventure that the second defendant did not proffer any proper explanation nor produce any invoices, receipts, payment vouchers or bank statements to justify that the purchase consideration had been duly made, as contended. He also did not call MYC despite the latter's oversight of and direct involvement in the dealings and transactions pursuant to the third SPA, as the second defendant himself admitted in court. As shown earlier, the second defendant could not on a balance of probabilities demonstrate that the full purchase price for the land had actually been made as alleged.

[77] We cannot but agree that as a consequence, registered title in the name of the second defendant has been rendered defeasible on proof that the purchase consideration that ought to have accompanied the sale and transfer of the land was manifestly lacking and seriously in doubt. This renders the transfer to have been inflicted with an insufficient instrument that decidedly vitiates the transfer in favour of the second defendant.

[78] The consideration for the third SPA, which is the sum of RM120,000, was said to have been paid by the second defendant to the first defendant by way of cash over a number of tranches based on the first defendant's request. The first defendant claimed at all material times to have accepted and acknowledged the full payment of the purchase price by the second defendant. The first defendant had executed the Form 14A for the conveyance of the land, acknowledging the receipt of the purchase price. But, the Form 14A was never put in evidence. And our finding that payment of the full purchase price was not proven by the defendants on a balance of probabilities meant that the transfer of the title to the land was obtained by void or insufficient instrument. This vitiated the indefeasibility of the title to the land under s. 340(2) of the NLC.

Whether This Is A Case Of A Void Or Insufficient Instrument Under s. 340(2)(b) Of The NLC

[79] We stress that even though neither the first defendant vendor nor the second defendant purchaser is claiming that payment was not made for the purchase of the land under the third SPA, as discussed above, it has not been proved, on a balance of probabilities that the purchase consideration had been paid by the second defendant let alone received by the first defendant.

[80] The record of appeal however, did not include the transfer instrument in respect of the sale and purchase of the land pursuant to the third SPA between these two parties. However, in our view, it cannot be doubted that a transfer of the land in favour of the second defendant that had been

registered must have at least on the face of it involved the observance of the pre-conditions of the presentation and registration of the requisite instrument of transfer in accordance with Part Eighteen of the NLC on the registration of dealings.

[81] In Division IV on Alienated Lands: Dealings, s. 206 specifically mandates the necessity of the dealing to be effected by way of the use of the relevant instrument that must be registered. Section 206(1) provides as follows:

> **206. Need for proper instrument of dealing duly registered**
>
> (1) Subject to the following provisions of this section:
>
> (a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and
>
> (b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen.

[82] Section 207(1) in turn provides for the need to employ the correct form of instrument, as follows:

> **207. Form of instruments of dealing**
>
> (1) Every instrument effecting any dealing under this Act shall be in such of the forms in the First Schedule as is specified in relation to the dealing in question in the appropriate Part of this Division:
>
> Provided that the form so specified for any dealing may, so long as the variation is not in a matter of substance, be used in any particular case with such adaptations, alterations or additions as may be rendered necessary by the character of the parties or other circumstances of the case.

[83] Thus, as for the dealing concerning transfers of lands, the instrument of transfer must comply with Form 14A, in pursuance of s. 215 of the NLC, which states:

> **215. Form, and effect generally, of transfer of land**
>
> (1) The transfer under this Act of any alienated land shall be effected by an instrument in Form 14A.
>
> (2) The title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land.
>
> …

[84] In the context of the instant case which concerns the transfer from the first defendant to the second defendant (per the third SPA), the relevant Form 14A as per the format, requires the proprietor of the land (the first defendant) to state, by choosing, in the matter in respect of the consideration for the transfer, the applicable mode from any one of the three following situations, and to delete the non-applicable two:

(a) In consideration of the sum of .... ringgit the receipt of which sum I hereby acknowledge;

*(b) In consideration of

.....

.....

.... (Here state the consideration (if other than money) and from whom it moves)

*(c) For no consideration.

[85] Whilst evidence of the Form 14A for the transfer in this case is not available, we surmise that given the case of the defendants that the consideration was RM120,000 which they had also confirmed being accordingly paid and received, the first defendant must have chosen to state that the above-stated item (a) was applicable for the transfer under the third SPA.

[86] However, as has been determined earlier, the payment of such consideration was not established. Consequently, in the absence of such consideration for the said transfer, the statement that must have been made by the first defendant that he had acknowledged receipt of the consideration sum of RM120,000 on the instrument of transfer in Form 14A itself would be untrue. This is regardless of the fact that the requisite stamp duty might even have been paid on the alleged consideration for the transfer given that s. 301 of the NLC also states that an instrument shall be fit for registration if and only if certain conditions are satisfied and these include that it is duly stamped in accordance with the provisions of the Stamp Act 1949.

[87] We are mindful that the defendants here appeared to have followed the relevant procedures for the registration of the instrument of transfer. The problem however, is that the statement by the defendants that the purchase consideration had been paid and received is untrue.

[88] Consideration is integral to a transfer transaction and it is a mandatory disclosure requirement in the instrument of transfer of land as prescribed in Form 14A. Declaring what the consideration sum is for the land transfer and acknowledging it has been received (and stamped on that basis) when none has actually been paid, let alone received, fundamentally impairs the integrity of the instrument and the dealing in land that was the transfer that it represents.

[89] The law provides that registration which is obtained by way of an insufficient or void instrument does not confer indefeasibility under s. 340(2)(b) on the title acquired. The plaintiffs did raise the issue of s. 340(2)(b) in their submissions but did not refer to any case law authorities, as their focus was more on the specific performance and the cancellation of the registration by reason, somewhat inaccurately as has been discussed earlier, only that the second defendant was not a *bona fide* purchaser.

[90] We nevertheless refer to the case of *Mook Meng Sun v. Loo Aa Kau & Ors* [2002] 2 CLJ 142; [2002] 2 MLJ 193 where the plaintiff, who had obtained judgment against the defendants pursued execution and obtained a prohibitory order in accordance with s. 338(1) of the NLC which barred the defendants from effecting any dealing in respect of their land. The land was however, transferred to another party. The plaintiff sought a declaration that the instrument of transfer by which the defendants transferred the land was void.

[91] The High Court agreed with the plaintiff that the registration of the transfer was prohibited by s. 336(1)(a) of the NLC but held that s. 340(2)(b) did not apply since the prohibition did not affect the character of the instrument of transfer. The following passage from the judgment of Abdul Aziz J (as he then was) is most instructive:

> Learned counsel for the plaintiff did not attempt to argue that the need to cancel the registration of a prohibited dealing overrides the indefeasibility of title conferred by s. 340(1). What he did was to resort to s. 340(2) and to submit that the third defendants' title was not indefeasible by virtue of para (b) thereof because the registration 'was obtained … by means of an insufficient or void instrument'. He relied on *United Malayan Banking Corp Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352, to argue that because the prohibitory order in this case prohibited the registration of the transfer and obliged the registrar to reject the instrument of transfer, the instrument was an insufficient or void instrument.
>
> In my opinion, *for an instrument to be regarded as an insufficient or void instrument, there must be something about the instrument itself that renders it insufficient or void.* There is no evidence as to that as regards the instrument of transfer in this case. As I said, had the instrument been presented and registered a day later, the plaintiff would have no ground to find fault with the registration. *The fact that the registration of the instrument was prohibited by reason of the existence of the prohibitory order cannot, in my opinion, affect the character of the instrument so as to render it an insufficient or void instrument. The prohibitory order is extraneous to the instrument and has nothing to do with the character of the instrument.* (emphasis added)

[92] It is clear that in *Mook Meng Sun* (*supra*) the instrument of transfer was not inherently flawed in any manner. The problem was it ought not to have been registered because of the existence of a valid order which prohibited any such dealing. But that order was extraneous to the instrument of transfer. There was nothing wrong with the instrument itself. Thus, the contention that the instrument was insufficient or void under s. 340(2)(b) is untenable.

[93] In our view, in light of *Mook Meng Sun*, on the facts of the case before us, it would not be wrong for us to state that the absence of consideration despite the declaration by the defendants to the contrary on the instrument of transfer in Form 14A makes the instrument inherently flawed and defective. It is thus an 'insufficient' instrument which renders the title registered in the name of the second defendant pursuant to the third SPA defeasible under s. 340(2)(b).

[94] Examples of cases where s. 340(2)(b) was applied by the courts include *Appoo Krishnan v. Ellamah Ramasamy* [1974] CLJU 8; [1974] 1 LNS 8; [1974] 2 MLJ 201 where the registration was held by the High Court to be void by reason of the instrument being insufficient or void as it had been effected pursuant to a transaction in violation of the Moneylenders Ordinance 1951; *Toh Huat Khay v. Lim A Chang* [2010] 7 CLJ 261; [2010] 4 MLJ 312 where the Federal Court held that the registration of a dealing in violation of a statutory restriction in interest was obtained by means of an insufficient or void instrument; and in *Puran Singh v. Kehar Singh Bahadur Singh* [1937] CLJU 51; [1937] 1 LNS 51; [1939] MLJ Rep 71 where the Court of Appeal similarly ruled that an instrument of dealing signed by an attorney under an invalid power of attorney was held to be insufficient or void instrument.

[95] Similar to the present case before us, but unlike in *Mook Meng Sun*, in all these other cases, due to the reasons as mentioned, the dealings in the relevant instruments themselves became tainted with invalidity. For emphasis, in *Mook Meng Sun*, the dealing itself, which was in the nature of a transfer transaction as set out in the instrument was perfectly regular – only that the existence of the prohibition order meant that the transfer, otherwise valid and registrable, could not be registered.

[96] In a more recent decision touching on the subject in *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271, the plaintiff purchaser claimed that despite full purchase price for the property having been made to the first defendant vendor, the title when it was subsequently available, was without the consent of the plaintiff, issued to the first defendant who then charged the same to a financial institution as security.

[97] The Federal Court held that the payment of the full purchase price for the property to the first defendant rendered the first defendant as a bare trustee. As a bare trustee, it was incapable of making any further dealing with

the property, including creating a charge under the NLC over the property, with the consequence that the financial institution obtained no valid interest from the charge transaction that it entered into with the first defendant. Abang Iskandar FCJ (now PCA) for the court, held:

> [88] Reverting to our immediate appeal, under the NLC, only a *bona fide* subsequent purchaser for value is protected under the express proviso to s. 340(3) of NLC. In this case before us, it is clear that the fourth defendant had its loan secured by registering a charge over the said loan immediately from the first defendant. At that material time, the first defendant had no longer any interest to be dealt with because it was then only a bare trustee for the deceased. In other words, no interest passed to the fourth defendant when the charge was registered by the fourth defendant. *The transaction between the first defendant and the fourth defendant was a direct and immediate purchase. It was a transaction that was vitiated by s. 340(2) of NLC as it was based on an insufficient or otherwise, void instrument, as the first defendant could not pass any title or interest in respect of the said property to the fourth defendant.*
>
> [89] That being the case, the fourth defendant being an immediate purchaser, under the law, it must have its interest by virtue of the registered charge, defeasible … (emphasis added)

[98] For completeness we would add that although the two words – insufficient and void – are often applied without distinction, the High Court in *Tan Tock Kwee & Anor v. Tey Siew Cha & Anor* [1995] 4 CLJ 658 stated that an insufficient instrument would be confined to the failure to comply with the procedures or formalities laid down by the NLC whilst a void instrument would largely relate to any prohibition imposed by the NLC or any written law.

[99] This endorses the view expressed in an earlier edition of the book *Land Law in Malaysia – Cases and Commentary* (Teo Keang Sood and Khaw Lake Tee, 2nd edn) which stated that an instrument of dealing may be considered to be insufficient though not necessarily void, for failure to comply with certain procedures or formalities as set out in the NLC. Examples, as noted in the book, include ss. 207 to 211 of the NLC. This is consistent with our finding herein on the implication of the absence of consideration on the instrument of transfer which declared to the opposite effect, *vis-à-vis* the requirement of the above-said s. 207 which provides that every instrument effecting any dealing under the NLC "shall be in such of the forms in the First Schedule as is specified".

[100] The learned authors of *Land Law in Malaysia – Cases and Commentary* referred to a void instrument as one which is forged or contrary to any restriction of interest, any prohibition or statutory provisions under the NLC or any written law, examples of which include dealings effected by minors

(see *Tan Hee Juan By His Next Friend Tan See Bok v. Teh Boon Keat And Lai Soon* [1933] CLJU 101; [1933] 1 LNS 101; [1934] MLJ 312) and dealings in contravention of Moneylenders Ordinance 1951 (see *Appoo Krishnan*), or in violation of any restriction in interest to which the land is subject (see *Toh Huat Khay*).

[101] In our judgment, an untrue or false declaration made in the instrument of dealing in this case, more so on the important subject of consideration, is a clear non-observance of the procedural requirements of especially the above-stated ss. 207 and 215. The relevant Form 14A is not complete in the sense envisaged by ss. 207 and 215. This would tantamount to the Form 14A being an insufficient instrument which renders the transfer void and the title registered in favour of the second defendant – an immediate purchaser – not indefeasible under s. 340(2)(b) of the NLC.

Whether Specific Performance Should Be Granted To The First Plaintiff For The Second SPA

[102] We agree that whilst any action under the first SPA would be time barred, the second SPA was as correctly ruled by the High Court, validly executed between the first plaintiff and the first defendant, and even a deposit of RM10,000 had been paid to the first defendant who had acknowledged the same. Despite this, the first defendant proceeded to enter into another agreement – the third SPA – with the second defendant, with significantly higher consideration, and in the process totally disregarded the interest of the first plaintiff. And this was also in spite of the first defendant having even signed a power of attorney and the requisite Form 14A in favour of the first plaintiff in pursuance of the second SPA.

[103] It bears emphasis that the High Court had also found the second SPA to be valid but instead ordered not a specific performance as prayed by the first plaintiff but for the first defendant to refund the deposit, and to pay damages of RM26,000 based on the differences in the purchase price of the land under the third SPA (RM120,000), and the purchase price under the second SPA (RM84,000).

[104] We agree that the plaintiffs' indolence for more than 13 years since the execution of the first SPA more than justified their suit against the defendants on the first SPA to be statute-barred.

[105] More importantly, in light of our finding that the second defendant had obtained the title of the land by means of an insufficient instrument in the absence of proof of consideration, we are of the view that there is no reason for the court to refuse the remedy of specific performance. We considered that damages would not be an adequate relief despite the High court's decision that refused the remedy of specific performance for the plaintiffs against the first defendant.

[106] The first plaintiff as the nominee of the second plaintiff had entered into the valid second SPA with the first defendant and continued to be willing to pay the remaining consideration under the second SPA for the land. Under these circumstances, we would construe that monetary damage would not be an adequate remedy for the land which could be deemed unique in value.

[107] It must after all be stressed that the exercise of this remedy is a matter of discretion as set out in s. 21 of the Specific Relief Act 1950 ("the SRA"). The power to grant this discretionary remedy of the decree of specific performance is set out in ss. 11, 18 and 21 of the SRA.

[108] We think it is useful for us to mention the case of *Ooi Siew Eng & Ors v. Link Ventures Sdn Bhd (In Liquidation) & Another Appeal* [2018] 5 CLJ 668 where the decision of the High Court refusing specific performance by reason of the non-payment of full purchase price by the applicant was set aside. The following passages on this very subject relevant to the instant case, from the judgment written by Mary Lim JCA (now FCJ) are instructive:

> [20] First, the exercise of this remedy is a matter of discretion as set out in s. 21 of the Specific Relief Act 1950:
>
> **Discretion as to decreeing specific performance**
>
> 21(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
>
> (2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:
>
> (a) where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiffs part; and
>
> (b) where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.
>
> [21] *The next provision to bear in mind when dealing with land, such as is the case of the four properties here, is s. 11(2) which provides that there is a rebuttable presumption that damages is not an adequate remedy:*
>
> (2) Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

[22] When seeking a decree of specific performance, a plaintiff may also claim compensation in addition to or *in lieu* of specific performance. In the award of such compensation, the court is guided by the principles of justice of the case:

> **Power to award compensation in certain cases**
>
> 18(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.
>
> (2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.
>
> (3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

[23] *In the present appeal, the learned judge had refused the remedy of specific performance on the basis that the appellants in the first appeal had not fully paid the purchase price. With respect, this is not a proper exercise of discretion as it does not accord with the settled and firm principles in this respect. Following from a pronouncement that the first set of SPAs is valid, the remedy of specific performance ought to have been granted given that the evidence show that the appellants remained able, willing and able to complete their part of the SPAs:* see *Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ 123; [1984] 1 MLRA 38; *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476; [1992] 4 MLRH 91. There was no evidence that the appellants were not able to complete their part of the bargain by paying up the various balance amounts. The appellants have in any event, explained why those amounts are outstanding, the appellants were waiting for instructions from Link Ventures, one of the reasons leading to the learned judge's conclusion as to why the first set of SPAs is valid.

[24] *It is our respectful view that the decree of specific performance ought to have been granted as the legal prohibitions under s. 21(2) were not present. The grant of specific performance will not give the appellants any unfair advantage over Link Ventures. Further, the grant will not involve any hardship on Link Ventures which was not foreseen. In fact, this is a non-issue since counsel for the liquidator has advised this court that the liquidator wishes to proceed with the completion of the SPAs.*

[25] Consequently, we allow the appeal of the appellants and order that the decree of specific performance be granted in respect of the first set of SPAs as prayed for in prayer B of the counterclaim. The grant of this order logically requires the appellants to pay the balance sums due under the first set of SPAs. The order of the High Court in this respect is set aside and the order of the High Court is varied accordingly. (emphasis added)

[109] In view of the analysis above, we are of the view that in this instant case, the conditions for the granting of specific performance have been fulfilled and it is a proper remedy to be awarded against the defendants.

Whether High Court Was Functus When Ordering Refund Of Deposit As Damages For The First Plaintiff

[110] For completeness, we should briefly discuss one other issue raised by the appellants which is on *functus*. Essentially, it was stated that after delivery of the decision by the High Court on 25 January 2022, the High Court had recalled the counsel for the parties to submit on the question whether the deposit that had been paid by the first plaintiff was to be refunded (after the plaintiffs had filed the notice of appeal on 21 February 2022). The High Court then on 8 March 2022 made the additional order that the first defendant refund the deposit of RM10,000 to the first plaintiff.

[111] The submission of the plaintiffs is that when the court directed the parties to submit on the issue whether the deposit paid by the first plaintiff ought to be ordered to be refunded to him, the court was already *functus officio* and had no power to make any order for variation after the judgment had been perfected. It was contended that this was done to justify the judgment of 8 March 2022 dismissing the remedy of specific performance.

[112] It will immediately be realised that as correctly submitted by the plaintiffs, the High Court was already *functus officio* such that it no longer had the jurisdiction to modify the order when the judgment was delivered on 25 January 2022 and that it had been perfected. Therefore, once an order has been made, entered and perfected, the court has no jurisdiction to amend the order unless there has been an accidental slip in drawing up the order, or unless the order as drafted does not correctly state what the court actually decided and intended (see *Affin Bank Bhd v. W T Low & Ng Realty Sdn Bhd* [2003] 1 CLJ 674).

[113] In *Hock Hua Bank Bhd v. Sahari Murid* [1980] CLJU 92; [1980] 1 LNS 92; [1981] 1 MLJ 143, Chang Min Tat FJ, delivering the judgment of the Federal Court stated:

> Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St Nazaire* Co 12 Ch D 88, *Kelsey v. Doune* [1912] 2 KB 482; *Hession v. Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v. Neotia & Co* [1918] AC 888 and *Jonesco v. Beard* [1930] AC 298.

[114] We agree that after having pronounced the decision of the court, and after the judgment or order on the decision had been sealed and perfected, it was not open to the High Court to subsequently make a further order on the suit (after recalling parties to submit on the issue of deposit refund) by effectively altering the judgment that had been pronounced on 25 January 2022 with the further order dated 8 March 2022, unless in situations recognised as exceptions under the law (such as under the slip rule or the exercise of the inherent power of court to make consequential orders particularly under the 'liberty to apply' exception to ensure the final judgment or order would not be rendered useless – see the Federal Court decision in *Stone World Sdn Bhd v. Engareh (M) Sdn Bhd* [2020] 9 CLJ 358; [2020] 12 MLJ 237), neither of which applies to the present case.

[115] Accordingly, the part of the High Court's decision on the payment of refund of the deposit by the first defendant to the first plaintiff and further that this be the damages payable by the first defendant to the first plaintiff is not valid and must be set aside.

Conclusion And Decision

[116] In conclusion, in light of the foregoing reasons, we are of the view that there is merit in this appeal to warrant appellate intervention in light of the clear lack of appreciation of evidence by the High Court particularly in respect of the non-payment of purchase consideration for the land under the third SPA, amounting to a serious misdirection which resulted in a miscarriage of justice. We are satisfied that the trial judge was plainly wrong in dismissing the plaintiffs' claim against the defendants when s. 340(2)(b) of the NLC should properly be applied in this case.

[117] We therefore set aside the order of the High Court and allow the appeal and grant the prayers in the re-amended statement of claim giving recognition to the second SPA (and not the first SPA) including for specific performance – namely for the defendants to deliver vacant possession of the land to the first plaintiff within 90 days from the date of this order, and with a liberty to apply to the High Court for any consequential order. We also award costs, subject to allocator, here and below, of RM20,000 against the first defendant, and RM30,000 against the second defendant.